Loh Eng Leong & Ors v Lo Mu Sen & Sons Sdn Bhd & Ors

HIGH COURT (TAIPING) — COMPANIES WINDING UP NO 28 –10 OF 1998
ZULKEFLI J
14 JANUARY 2000

Companies and Corporations — *Winding up — Petition — Quasi partnership company, whether proved — Whether entity has remetamorphosed into company upon incorporation — Whether mala fidei intention to wind up company — Delay in filing petition — Allegation of deadlock — Petitioners claimed to have legitimate expectation to manage company — Whether expectation valid — Companies Act 1965 s 218(1) (f) & (i)*

The petitioners filed a petition under s 181 of the Companies Act 1965 ('the Act') seeking for an order that the first respondent company be wound up under s 218(1)(f) and (l) of the Act. In support of their application, the petitioners had put forward a number of allegations against the respondents. Most of the grounds of allegations of the petitioners relied under the petition were matters relating to the dissatisfaction of the first petitioner. The petitioners also contended: (i) the principles of quasi partnership and partnership law applied to their case because the first respondent company was a company that was being managed on a basis of partnership; and (ii) the first respondent company as a family company could not achieve an understanding among its members and there was a deadlock among the shareholders and its board of directors. Hence it was the submission of the petitioners that it was just and equitable that the company be wound up.

Held, dismissing the petition:

(1) Having studied all the affidavits filed by the petitioners and the respondents and having heard the submission of both counsels, the court found that the petitioners failed to prove all their allegations against the respondent in order to allow this court to exercise its discretionary power under s 218(1)(f) and (i) of the Act to wind up the first respondents company. It is a principle of law that the petitioners must prove what had been pleaded in their petition and what had been averred in their affidavits were true. In this regard, the court found that the answers and explanations given by the respondents in their affidavits had credibly denied all the allegations made in the affidavits of the petitioners and as such all the allegations of the petitioners must be deemed to be of no merit and were baseless. In the present petition in the absence of oral evidence or cross-examination of witnesses and deciding the case purely on the basis of undisputed facts, the petitioners had not proven their allegations to allow the court to make an order of the winding up of the first respondent company (see pp 540E–F, 543G–H, 544A).

(2) The first respondent company could not be deemed to be partnership company or a 'quasi partnership' company because

the first respondent company had been capitalised from the assets of the third respondent when it was a first incorporated. The court also found as a fact that since the incorporation of the first respondent company, it had been managed in accordance with the articles and memorandum of association of the company and the provisions of the Act (see p 544C–D). A

(3) The principles of partnership law could not apply to the present case because in this case there was not partnership at all. Furthermore, the petitioners had not shown that they had given any consideration for the shares that had been given to them. In fact, the petitioners could be said to be only 'trustees' to the third respondent who at the incorporation had given them the shares for love and affection as a father to all of them (see p 544G–H); *Ebrahim v Westbourne Galleries Ltd & Ors* [1973] AC 360 distinguished. B C

(4) Even if the petitioners were right in their contention that the first respondent company when it was first incorporated was in substance a partnership, the court would still nevertheless find that the company after its incorporation had remetamorphosed into a company that was being managed under the Companies Act and under its articles and memorandum of association (see p 545G–H). D

(5) The court found that the petitioners had a mala fide intention to wind-up the first respondent company and making it the means of bringing about a collateral purpose. Therefore it must be treated that they had come to seek the court's assistance with 'unclean hands' and the court should dismiss such application (see p 546B–C, G). E F

(6) There had been an inordinate delay by the petitioners in filing this petition and added to that fact it could safely be said that the petitioners had acquiesced to all the acts and decision taken by the Board of Directors of the first respondent company in relation to all the matters which they had now raised and alleged against the respondent. Inordinate delay in the presentation of the petition was sufficient to debar the petitioners from relief by way of an order for winding up (see pp 546I–547A, D). G

(7) The petitioners had been more than unreasonable than cooperative in the management of the affairs of the first respondent company which all the while had been successful and making profits in its business undertaking. If at all there was any deadlock, such a deadlock would have been created by the petitioners themselves and just because they were not happy with the way things were now run, it did not mean that they would have an automatic right to wind up the company (see p 548A–B). H I

(8) Even if the petitioners claimed that they had a legitimate expectation to manage the first respondent company in the

manner that it should be managed as earlier intended when it was first incorporated, they stand to lose that equity if they abandon the task entrusted to them. In such a case, they could not subsequently complain that they had been excluded from management merely because they wanted to get back into management (see p 548C–D).

[Bahasa Malaysia summary

Pempetisyen-pempetisyen telah memfailkan petisyen di bawah s 181 Akta Syarikat 1980 ('Akta tersebut') memohon untuk perintah bahawa responden pertama akan digulungkan di bawah s 218(1)(f) dan (l) Akta tersebut. Sebagai menyokong permohonan mereka, pempetisyen-pempetisyen telah mengemukakan beberapa pengataan terhadap responden-responden. Kebanyakan daripada alasan yang pempetisyen-pempetisyen bergantung di bawah petisyen adalah perkara-perkara yang berkaitan dengan ketidakpuasan pempetisyen-pempetisyen. Pempetisyen-pempetisyen juga menegaskan: (i) prinsip-prinsip kuasi perkongsian dan undang-undang perkongsian terpakai kepada kes mereka oleh kerana syarikat responden pertama adalah syarikat yang diuruskan berdasarkan perkongsian; dan (ii) syarikat responden pertama sebagai syarikat yang berkaitan tidak boleh mencapai persefahaman antara ahli-ahlinya dan tiada kata sepakat antara pemegang-pemegang saham dan lembaga pengarahnya. Oleh itu, ia adalah hujahan pempetisyen-pempetisyen bahawa ia adalah adil dan berekuiti bahawa syarikat digulungkan.

Diputuskan, menolak petisyen tersebut:

(1) Selepas membaca semua afidavit yang difailkan oleh pempetisyen dan responden-responden dan selepas mendengar hujahan peguam kedua-dua pihak, mahkamah mendapati bahawa pempetisyen-pempetisyen gagal untuk membuktikan semua pengataan-pengataan mereka terhadap responden agar mahkamah ini menjalankan kuasa budi bicaranya di bawah s 181(1)(f) dan (l) Akta tersebut untuk menggulungkan syarikat responden pertama. Adalah prinsip undang-undang bahawa pempetisyen-pempetisyen mestilah membuktikan apa yang telah diplidkan di dalam petisyen mereka dan apa yang ditegaskan di dalam afidavit-afidavit mereka adalah benar. Berkaitan ini, mahkamah mendapati bahawa jawapan dan penjelasan yang diberikan di dalam afidavit-afidavit mereka telah secara boleh dipercayai menafikan semua pengataan-pengataan yang dibuat di dalam afidavit-afidavit pempetisyen-pempetisyen dan oleh itu semua pengataan-pengataan pempetisyen-pempetisyen mestilah dianggap sebagai tiada merit dan tidak berasas. Di dalam petisyen ini, di sebalik ketiadaan keterangan lisan dan pemeriksaan balas saksi-saksi dan memutuskan kes dengan hanya berdasarkan fakta-fakta yang tidak dipertikaikan, pempetisyen-pempetisyen belum

membuktikan pengataan-pengataan mereka agar mahkamah membenarkan suatu perintah pengulungan dibuat ke atas syarikat responden pertama (lihat ms 540E–F, 543G–H, 544A). A

(2) Syarikat responden pertama tidak boleh dianggap sebagai syarikat perkongsian atau suatu syarikat 'kuasi perkongsian' oleh kerana syarikat responden pertama telah didanakan oleh aset-aset responden ketiga apabila ia diperbadankan pada mulanya. Mahkamah juga mendapati sebagai fakta bahawa sejak perbadanan syarikat responden pertama, ia telah diuruskan menurut artikel dan memorandum persatuan dan peruntukan-peruntukan Akta (lihat ms 544C–D). B

(3) Prinsip undang-undang perkongsian tidak terpakai kepada kes ini oleh kerana di dalam kes ini tidak terdapat perkongsian langsung. Selanjutnya pempetisyen-pempetisyen tidak menunjukkan bahawa mereka telah berikan sebarang balasan untuk saham-saham yang telah diberikan kepada mereka. Hakikatnya, pempetisyen-pempetisyen tersebut hanya boleh dianggap sebagai 'pemegang amanah' kepada responden ketiga di mana pada masa perbadanan telah memberikan mereka saham-saham atas kasih sayang seorang ayah kepada mereka (lihat ms 544G–H); *Ebrahim v Westbourne Galleries Ltd & Others* [1973] AC 360 dibeza. C D

(4) Walau sekalipun pempetisyen-pempetisyen adalah betul di dalam penegasan mereka bahawa syarikat responden pertama apabila ia mula diperbadankan pada zahirnya adalah suatu perkongsian, mahkamah akan tetap membuat penemuan bahawa syarikat tersebut selepas perbadanannya bertukar menjadi sebuah syarikat yang diuruskan di bawah Akta Syarikat dan di bawah artikel dan memorandum persatuan (lihat ms 545G–H). E F

(5) Mahkamah mendapati bahawa pempetisyen-pempetisyen mempunyai niat mala fide untuk menggulungkan syarikat responden pertama menjadikannya suatu cara untuk membawakan suatu tujuan kolateral. Oleh itu, ia mestilah dianggap bahawa mereka datang untuk meminta bantuan mahakmah dengan tidak suci hati ('unclean hands') dan mahkamah sepatutnya menolak permohonan sedemikian (lihat ms 546B–C, G). G

(6) Terdapat kelengahan yang melampau oleh pempetisyen-pempetisyen di dalam memfailkan permohonan ini dan ini ditambah pula dengan fakta bahawa ia boleh dikatakan bahawa pempetisyen-pempetisyen telah akuiesens kepada semua tindakan dan keputusan yang diambil oleh Lembaga Pengarah syarikat responden pertama berkenaan dengan perkara-perkara yang mereka sekarang bangkitkan dan katakan terhadap responden. Kelengahan melampau di dalam pengemukaan petisyen tersebut adalah mencukupi untuk menghalang pempetisyen-pempetisyen daripada relif melalui perintah penggulungan (lihat ms 546I–547A, D). H I

(7) Pempetisyen-pempetisyen telah bertindak lebih daripada tidak munasabah dan mereka enggan bekerjasama di dalam hal-hal pengurusan syarikat responden pertama yang sepanjang masa telah berjaya meraih keuntungan di dalam perniagaan yang dilibatnya. Jika wujud jalan buntu, ia telah diwujudkan oleh pempetisyen-pempetisyen mereka sendiri dan hanya semata-mata mereka tidak puas hati dengan cara ia diuruskan, dan ini tidak bermakna mereka mempunyai hak automatik untuk menggulungkan syarikat tersebut (lihat ms 548A–B).

(8) Walau sekalipun pempetisyen-pempetisyen mendakwa mereka mempunyai harapan sah untuk mengurus syarikat responden pertama di dalam cara di mana ia diniatkan terdahulu apabila ia diperbadankan, mereka mempunyai risiko untuk kehilangan ekuiti jika mereka meninggalkan tanggungjawab yang diamanahkan kepada mereka. Di dalam kes sebegini, mereka tidak boleh kemudian mengadu bahawa mereka telah dikecualikan daripada pengurusan hanya semata-mata mereka ingin kembali masuk ke dalam pengurusan (lihat ms 548C–D).]

Notes

For cases on winding-up petition generally, see 3 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 809–840.

Cases referred to

Cadiz Waterworks Co v Barnett (Supreme Court) 1894 CA LR 182 (refd)
Ebrahimi v Westbourne Galleries Ltd & Ors [1973] AC 360 (distd)
Jordan and Mckenzie, Re (1980) 117 DLR (3d) 751 (refd)
Lo Siong Fong, Re [1994] 2 MLJ 72 (refd)
Loch v John Blackwood Ltd [1924] AC 783 (refd)
Loh Eng Leong & Ors v Lo Mo Sen & Sons Sdn Bhd & Anor [1999] 5 CLJ Supp 510 (refd)
Senson Auto Supplies Sdn Bhd, Re [1988] 1 MLJ 326 (refd)
Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433 (refd)
Tien Ik Enterprises Sdn Bhd & Ors v Woodsville Sdn Bhd [1995] 1 MLJ 769 (refd)
Wondoflex Textiles Pty Ltd, Re [1951] VLR 458 (refd)
Yai Yen Hon & Ors v Lim Mong Sam [1997] 2 MLJ 190 (refd)
Yenidje Tobacco Co Ltd, Re [1916] 2 Ch 426 (refd)

Legislation referred to

Companies Act 1965 ss 131, 218(1)(f),(i)

Cecil Abraham (*MK Yee* with him) (*Shearn Delamore & Co*) for the petitioners.

Kalearasu (*Yong Nyet Kim* with him) (*Kim & Associates*) for the respondents.

Zulkefli J:

The petition

The petitioners filed this petition under s 218 of the Companies Act 1965 for the following reliefs:

(a) that the first respondent company be wound up by this honourable court under s 218(1)(f) and (i) of the Companies Act 1965 and that an approved company liquidator or liquidators nominated by the petitioners be appointed liquidator(s) of the company;

(b) that the cost of this petition be paid to the petitioners by the respondents.

Section 218(1)(f) and (i) of the Companies Act 1965 states as follows:

> (1) The Court may order the winding-up if ...
> (f) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members.
> (i) the Court is of the opinion that it is just and equitable that the company be wound up.

Facts of the case

The undisputed facts of the case are as follows:

The first respondent company is a private limited company registered under the Companies Act 1965 on 8 September 1970 with the family members holding their shares as follows:

Share Holders	Total Number Of Shares	Percentage
Lo Mu Sen [Third Respondent]	37	3.2
Loh Eng Leong [First Petitioner]	241	20.7
Loh Eng Wah [Second Respondent]	241	20.7
Lo Yoon Nien [Third Petitioner]	161	13.8
Loh Yoon Hoi [Second Petitioner]	161	13.8
Lo Yoon On	161	13.8
Lo Yoon Khong	161	13.8
	1163	100.0

The three petitioners and the second respondent are brothers. The first respondent company was founded by the father, the third respondent who was then the chairman. Prior to the setting up of the first respondent company the father had been operating as a sole proprietor in pawnshops and crockery retailing shops. With the setting up of the first respondent company called Lo Mu Sen & Sons (Sdn) Bhd the father gave shares without any consideration but for love and affection to his siblings.

The first respondent company is managed according to the articles and memorandum of association of the company and the Companies Act 1965. On 6 November 1996 the second respondent bought 161 shares from one

of the shareholders named Lo Yoon Khong on the basis of a willing buyer and willing seller. The sale of these 161 shares was brought to the attention of all the shareholders including the petitioners and was approved by the board of directors of the first respondent company. The transfer of the said shares was registered with the registrar of companies and the members thereafter holding the shares are as follows:

Share Holders	Total Number Of Shares	percentage
Lo Mu Sen [Third Respondent]	37	3.2
Loh Eng Leong [First Petitioner]	241	20.7
Loh Eng Wah [Second Respondent]	402	34.6
Lo Yoon Nien [Third Petitioner]	161	13.8
Loh Yoon Hoi [Second Petitioner]	161	13.8
Lo Yoon On	161	13.8
	1163	100.0

Notwithstanding the above state of position of the shareholding the petitioners thereafter filed a court action under the Originating Summons No 24–51–98 (T) on 20 March 1998 under s 162 of the Companies Act 1965 for the said 161 shares belonging to Lo Yoon Khong not to be registered under the name of the second respondent and for the said shares be allowed to be sold to all the members. The petitioners action was dismissed with cost by this court on 11 September 1998. Following that, the petitioners filed two applications by way of the present petition under s 218(1)(f) and (i) and the other under one more petition under s 181 of the Companies Act 1965.

From the affidavits filed by both the petitioners and the respondents the following relevant fact should also be noted:

(i) The first petitioner had migrated to Australia in 1986 and is now a permanent resident in that country. Most of the time, the first petitioner does not reside in Malaysia and until today he has not provided any evidence whether he is in the country.

(ii) At the time when the first petitioner stated that he is working for the first respondent company it is known that he is also working for a firm named Tai Lee Finance in Malaysia.

(iii) The first petitioner had all this while reaped the profits derived from the business of the first respondent company and had acquiesced to all the activities and conduct of the company but now alleges that the company had not been properly managed using the platform of just and equitable to wind up the company.

(iv) Most of the grounds of allegations of the petitioners relied under this petition are matters relating to the dissatisfaction of the first petitioner himself. The second petitioner and the third petitioner seemed not to know much about the action taken by the first petitioner. This is evidenced by the fact that the first petitioner had stated that the second petitioner is not well and the third petitioner is not that competent enough to take up the action against the respondents.

(v) There is an affidavit in opposition to this petition filed by one shareholder named Lo Yoon On who is not cited as a party to this petition and who owned 13.8% shares in the first respondent company shareholding. Lo Yoon On in his affidavit stated that the first petitioner has tried to persuade him to join the first petitioner in this action for the winding up of the first respondent company but he refused to do so. Lo Yoon On in his affidavit had opposed this application by the petitioners on the ground that the first respondent company had been well managed for the benefit of the company and its members and the company had been making profit and paying dividends to its members.

The petitioners' case

In support of their application and from their affidavits filed therein to wind-up the first respondent company the petitioners had put forward a number of grounds or allegations against the respondents which can be dealt with respectively under the following headings:

(i) Transfer of shares

The petitioners have alleged that the transfer of the 161 shares to the second respondent from one of the member Lo Yoon Khong was not done in accordance with the provision of the article and memorandum of association of the company. It is the contention of the petitioners that art 21 of the article and memorandum of association of the company imposed a prohibition or restriction on the transfer of shares from members to members and that a member of the company when transferring any shares to another member is required to give a transfer notice to the company. In this case it was alleged that no transfer notice was given when the transfer of the said 161 shares was effected.

(ii) Payment of salaries

The petitioners alleged that the first petitioner had been stopped from being paid his salaries due from the various business activities carried out by the first respondent company by way of a memorandum sent out by the company on 8 December 1997. The petitioners claimed that this was done without discussion with the first petitioner. It is also alleged that on 23 February 1998 the third petitioner was directed by the first respondent company to take unpaid leave in view of his involvement in the action taken against the respondents under the case in the said Originating Summons No 24–51–1998(T). It is further alleged that the second respondent as the managing director of the company had reduced the salary of the third petitioner as much as fifty percent. The second respondent had also terminated the cost of living allowances and other expenses received by the third petitioner from the various business activities of the first respondent company. The petitioners alleged that the third respondent who is not working any more is receiving salary from the first respondent company. One more allegation made by the petitioners is that payment of salary was

also made to the wife of the second respondent named Chong Yew Thai in 1996 for an amount of RM115,266.70 including bonuses. The petitioners claimed that to their knowledge Chong Yew Thai at all material time is a housewife and has never worked or involved actively in the running of the first respondent company.

(iii) The termination of the service of the first petitioner as the licensed auctioneer for the first respondent company

The first petitioner is a holder of a license to act as an auctioneer since the year 1970. In the year 1987 the first petitioner claimed that he had helped the second respondent to secure a license as an auctioneer. There was an arrangement that the first petitioner and the second respondent would act alternately as an auctioneer in the auction proceedings conducted by the first respondent company. The first petitioner claimed that by the way of a letter dated 5 December 1997 the first respondent company terminated his services as an auctioneer to the company commencing with immediate effect without giving sufficient reasons. As a result the first petitioner claimed that he had loss an income of about RM20,000 a month. The first petitioner further alleged that there is a possibility he would loose his license as an auctioneer and he would not be able to work for other companies for his services as an auctioneer because these companies have identified him as still with the first respondent company.

(iv) Payment of bonus and allowances for the directors

The petitioners alleged that the second respondent being the managing director of the first respondent company had made arrangement to pay larger sums of moneys to himself as directors fees, bonuses and allowances as compared to what the petitioners as directors would receive.

(v) Declaration of dividends

The petitioners alleged that the second and the third respondent had increased the percentage of dividends payable from the first respondent company from one percent to ten percent even though the total profits for the years 1996 and 1997 are more or less the same. The petitioners further alleged the respondents had passed a resolution of increasing the percentage of dividends payable because the second respondent had obtained more shares after he had purchased the 161 shares from Lo Yoon Khong in November 1996. It was submitted for the petitioners that it was in the interest of the second respondent that he had recommended a higher payment of dividends.

(vi) Refusal to furnish the management accounts of the first respondent company to the petitioners.

The petitioners claimed that to safeguard their interest in the first respondent company, the first petitioner had since December 1997 often requested a number of documents from the company to be furnished to the

petitioners. However the petitioners alleged that the first respondent company continuously refused to furnish the said document relating to the accounts of the company. Finally on 27 April 1998 the first petitioner directed his firm of solicitors of M/s Shearn Delamore & Co to write in to the respondents solicitors of M/s Kim & Associate demanding that the first petitioner be allowed to scrutinize the records of the first respondent company under the provision of s 167(3) of the Companies Act 1965.

(vii) The suspension of the first petitioner

The first petitioner claimed that on 28 July 1997 he was informed by way of a memorandum that he has to record in writing to the supervisor or to the second respondent, the managing director of the first respondent company as to when he will continue to work with the company and also to inform them as to his whereabout. On 8 December 1997 the second respondent by way of another memorandum had directed all the managers of the shops owned by the first respondent company to suspend the salaries of the first petitioner beginning from 1 December 1997 until further notice. Following that the first petitioner was required to attend before an inquiry board comprising of the second and the third respondent on 29 December 1997. On 2 January 1998 the first petitioner was informed by way of a memorandum from the second and the third respondent that he has been suspended from work. The first petitioner alleged that he was aggrieved by all these decisions taken against him and that it had affected his reputation.

(viii) The removal of the first petitioner as a signatory to all business of banking

The first petitioner claimed that he has always been a signatory on behalf of the first respondent company in all the business of banking carried out since the inception of the company. Nevertheless on 8 December 1997 it was resolved that the first petitioner was no more a signatory without giving any explanation to him. The first petitioner also claimed that at the material time he was still one of the guarantors for the first respondent company for the various banking facilities taken by the company.

(ix) Higher interest rates paid on the loan given by the second respondent and the third respondent to the first respondent company

Interest rates of not less than 18% pa was given by the second and the third respondent for loans purportedly given to the first respondent company. This in the view of the petitioners is clearly meant not for the benefit of the company because the company was not utilising fully the credit facilities available from the commercial banks which would bring in a lower interest rate. The petitioners also claimed that at the same time the funds of the first respondent company itself had been deposited with the commercial banks and bringing a fix interest rate of not less than 18% pa and it is the petitioners' contention that these funds should have been used to resolve the loans purportedly given by the second and the third respondent.

Deadlock and application of principles of partnership law

It is also the contention of the petitioners based on the facts deposed from the affidavits filed by both parties and from the mode of the language used in the affidavit by both parties it would appear that the first respondent company as a family company could not achieve an understanding among its members and that there is a deadlock among the shareholders and its board of directors. Hence, it is the submission of the petitioners that it is just and equitable that the company be wound up.

At the time of the filing of this petition by the petitioners, the first respondent company only had three directors and they are the first petitioner, the second respondent and the third respondent. In the circumstances of the case the petitioners contended that in all the actions taken by the first respondents company both the second respondent and the third respondent had acted on personal grounds and for their own benefits and not for the benefits of the first respondent company.

The petitioners also contended that the principles of quasi partnership and partnership law apply to their case because the first respondent company is a company that is being managed on a basis of a partnership. The two cases of *Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360 and *Re Wondoflex Textiles Pty Ltd* [1951] VLR 458 were cited by the learned counsel for the petitioners on the application of the principles of partnership law and on the consideration of whether it is just and equitable that a company is to be wound up on a given set of facts and circumstances of the case. The facts of the case and the legal principles laid out in *Westbourne Galleries Ltd*'s case may be stated as follows:

E and N were partners in a business from 1945 until 1958 when a private company was formed to take over the business. E and N were its first directors. Under the articles the members in general meeting had an express power to remove a director by ordinary resolution. Soon after 1958, N's son, G, was made a director. N and G had a majority of the votes in general meeting. The company prospered and all profits were distributed as director's remuneration. No dividend was ever paid. In 1969, after a disagreement between E and N, an ordinary resolution was passed by the members in general meeting by the votes of N and G, removing E as a director. E petitioned for: (1) an order under the oppression provision in the Companies Act 1948 s 210, that N and G should purchase his shares or sell their shares to him on such terms as the court should think fit; or (2) order that the company be wound up under the 'just and equitable' clause.

At first instance Plowman J refused an order under s 210 but made an order for winding up. The Court of Appeal reversed the decision on winding up. The Court of Appeal held that the exercise of the power of removal under the articles or the statute could not form a ground for holding that it was just and equitable that the company be wound up unless it could be shown that the power was not exercised bona fide in the interests of the company; or that the grounds for exercising the power were such that no reasonable person could think that the removal was in the interest of the company.

The House of Lords however restored the decision of Plowman J. The House of Lords approved earlier cases which had seen a similarity between this type of company and a partnership and which had applied by analogy the principles of partnership law. Those principles recognized that people do not become partners unless they have confidence in one another and that it is the essence of the relationship that mutual confidence be maintained. If that confidence has ended so that they can no longer work together in the way originally contemplated, the relationship should be ended. It was held then that it was appropriate to deal with the relationship between E and N as if they were partners.

The learned counsel for the petitioners submitted that a similar case of exclusion from management in a small company resembling a partnership had arisen in In *Re Wondoflex Textiles Pty Ltd*'s case and Smith J had arrived at a similar decision. Lord Wolberforce in the House of Lords in *Westbourne Galleries Ltd*'s case approved the judgment and cited Smith J's dictum that may be stated as follows (at p 378):

> Acts which, in law, are a valid exercise of powers conferred by the articles may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they become members of the company; and in such cases the fact that what has been done is not in excess of power will not necessarily be an answer to a claim for winding up. Indeed, it may be said that one purpose of the [just and equitable provision] is to enable the court to relieve a party from his bargain in such cases.

Findings of the court

Having studied all the affidavits filed by the petitioners and the respondents and having heard the submission of both the learned counsels for the petitioners and the respondents, it is my finding that the petitioners have failed to prove all their allegations against the respondents in order to allow this court to exercise its discretionary power under s 218(1)(f) and (i) of the Companies Act 1965 to wind up the first respondent company. In coming to this finding I am fully aware of the principles as laid down by the Supreme Court. In the case of *Tien Ik Enterprises Sdn Bhd & Ors v Woodsville Sdn Bhd* [1995] 1 MLJ 769 wherein it was held inter alia that it is not obligatory for the court to consider the availability of alternative remedies before making a winding up order under s 218(1)(i) of the Act. I am also guided by the principles as laid down in the case of *In Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426 wherein the Court of Appeal of England held the view that notwithstanding a company was making profits and successful, if there exists a situation of deadlock it would then be just and equitable that the company be wound up.

On the petitioners allegation that the transfer of the said 161 shares from a member, Lo Yoon Khong to the second respondent not being in accordance with the provision of the article and memorandum of association of the company, I need only reproduce my decision in the case of the said Originating Summons No 24–51–98(T) (see the case of *Loh Eng Leong & Ors v Lo Mo Sen & Sons Sdn Bhd & Anor* [1999] 5 CLJ

Supp 510)). In that case, I held the view that art 21 of the article and memorandum of association of the company does not impose any prohibition or restriction on the transfer of shares from members to members and that a member of the company when transferring any shares to another member is not required to give a transfer notice to the company. I further held the view that there was a valid contract between a willing seller and a willing buyer in the transfer of the disputed shares to the second respondent. The court must respect the intention of the two parties who had entered into a contract wherein there was an offer and acceptance with consideration. It was therefore not opened to the petitioners to seek the assistance of the court to allow them to be a party to the said contract.

Relating to the issue of salaries raised by the petitioners I find that all the allegations made against the respondents have been credibly denied by the respondents as stated in their affidavits in reply. The respondents have replied by stating that the memorandum that was sent to the first petitioner was intended for the purpose of computing the salaries of the first petitioner when he comes back to Malaysia to work for the first respondent company. The respondents conducted an inquiry to determine the working status of the first petitioner but the first petitioner failed to attend the said inquiry. As regards the third petitioner he had been advised to withdraw the action taken under the said Originating Summons No 24–51–98(T). When the third petitioner refused to heed the advice the second respondent and the third respondent under a memorandum dated 23 February 1998 directed the third petitioner to take leave until the disposal of the said case. In view of the economic slow down the respondents have contended that they had to take step to reduce the salaries of their directors and officers as much as 35% for those earning between RM10,000 to RM20,000 a month and the deduction of 50% for those earning between RM20,000 to RM30,000. All the officers and directors of the company in fact had undergone a reduction in salaries. The respondents have also replied by stating that the third respondent is still working actively in supervising the management of the first respondent company and therefore is still entitled to receive his salary. As regards the appointment of Chong Yew Thai, the wife of the second respondent to work in the company, the respondents have replied by stating that the appointment of Chong Yew Thai was in fact proposed by the first petitioner. The first petitioner also appoints his own wife to work for the first respondent company for three months.

As regards the issue of termination of the services of the first petitioner as the licensed auctioneer for the first respondent company, I find that the respondents have given a plausible explanation for the action they had taken against the first petitioner. The respondents claimed when the first petitioner was a director of the first respondent company he had carried out the duties of an auctioneer and received commissions without declaring his interests in the company and he was never appointed at all by the Board of Directors of the company to carry out the duties of an auctioneer. Hence it is the contention of the respondents that the first petitioner's action is in breach of the provision of s 131 of the Companies Act and for that reason his services was terminated. As regards the position of the second

respondent it was stated by the respondents that the second respondent obtained his license as an auctioneer by virtue of his experience as an engineer and was appointed officially as an auctioneer for the first respondent company on 24 July 1991 and he had declared his beneficial interest as a director who was receiving commissions from the company. The respondents further alleged that the first petitioner had failed to attend an enquiry to resolve the problems relating to the termination of his work as an auctioneer.

On the issue of the payment of bonus and allowances for the directors, I find that the respondents have explained that the board of directors of the first respondent company had approved the payment of salaries of the directors by paying on a basis of working shareholders only according to the place of work of the directors concerned. It was stated that the second respondent, the third respondent and the third petitioner received bigger salaries because they had work full time at five pawnshops owned by the company.

As regards the issue of declaration of dividends the respondents have replied by stating that the dividends declared for the years 1996 (1%) and 1997 (1%) was agreed upon unanimously in the board of directors meeting of the first respondent company including the first petitioner who at the material time was a director from 1993 until 1997. The respondents have also refuted the allegation of the petitioners that the respondents started to give higher dividends from 1997 on the ground that the second respondents was in possession of larger number of shares after the purchase of 161 shares from Lo Yoon Khong as being baseless. This is evidenced by the fact that the respondents did not declare a 10% dividend for the year 1996 even though the second respondent had obtained the said shares from Lo Yoon Khong in November 1996. Furthermore, it is the contention of the respondents that the petitioners have never registered their objection on the matter in the Annual General Meeting of the company which they should have done if they are so aggrieved.

On the allegation of the refusal of the respondents to furnish to the petitioners the management accounts of the first respondent company when requested, the second and the third respondent had denied this allegation in their affidavit in reply. The respondents had stated that the first respondent company took about two weeks to search for the old records because some of the documents had been seized by the inland revenue department when the said department was investigating the financial accounts and tax liability of the company in October 1996. The respondents had also alleged that the first petitioner himself had seized some of the document of accounts of the company and that the secretary of the company had seen the first petitioner broke the padlock to the cabinet in the company's office to take possession of the documents on 24 May 1998. As regards the petitioners' request to furnish them the profits and loss account on 28 February 1998, the respondents contended that it was impossible to comply to such a request when the said profit and loss account was only received from the company's auditor on 6 August 1998.

A On the issue of suspension of the first petitioner, I find that the respondents had explained that they had directed the first petitioner to inform them of his working status by way of a memorandum dated 28 July 1997 and following that the first petitioner was directed to attend an inquiry on 29 December 1997. The decision to suspend the first petitioner from his involvement in the first respondent company was taken since the first B petitioner refused to inform his whereabout and to confirm whether he is working for the company or not. The petitioner also failed to attend an inquiry for him to state his case.

Regarding the issue of the removal of the first petitioner as a signatory to all the business of banking of the first respondent company the second C respondent and the third respondent have replied by stating that they decided that the first petitioner should not be made a signatory because he was not carrying out his duties fully in the company. The first petitioner often did not come for work and he was for most of the time in the year stays in Australia. In this regard it was therefore not advisable for the first petitioner to be made a signatory for the banking transactions of the D company. The decision to remove the first petitioner as a signatory was made through the board of directors meeting of the company on 8 December 1997.

On the issue of the higher interest rates paid on the loan given by the second respondent and the third respondent to the first respondent E company, I find that both the second respondent and the third respondent have replied by stating that the rate of 18% pa imposed on the loan to the first respondent company by both the second respondent and the third respondent was not something irregular. This rate of interest was once suggested by the first petitioner himself in 1993 to the directors of the company because the said loan from them to the company was unsecured F and has to be paid on a higher interest rate of 18% pa. The Board of Directors of the first respondent company thereafter approved a resolution dated 3 August 1993 wherein the loan was given through the second respondent and the third respondent because both of them are licensed money lenders.

G I must state here that it is a principle of law that the petitioners must prove what have been pleaded in their petition and what had been averred in their affidavits are true. In this regard it is my finding that the answers and explanations given by the respondents in their affidavits have credibly denied all the allegations made in the affidavits of the petitioners and as such all the allegations of the petitioners must be deemed to be of no merits H and are baseless. On this point I would like to refer to the case of *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 wherein the Privy Council in hearing an appeal case on a winding up proceedings, inter alia, had this to say:

> I If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.

Hence in the present petition in the absence of oral evidence or cross-examination of witnesses and deciding the case purely on the basis of undisputed facts it is my view that the petitioners have not proven their allegations to allow this court to make an order of the winding up of the first respondent company.

In deciding whether to allow or not the petition of the petitioners I have also come to a conclusion that I could not accept the contention of the petitioners that the first respondent company is a company that had been managed on the basis that it is a partnership or a quasi partnership and that the principles of partnership law should be applied in determining the state of relationship of the members and directors of the company. It is my view that the first respondent company cannot be deemed to be 'partnership' company or a 'quasi partnership' company because the first respondent company had been capitalized from the assets of the third respondent when it was first incorporated on 8 September 1970. I also found as a fact that since the incorporation of the first respondent company it had been managed in accordance with the articles and memorandum of association of the company and the provisions of the Companies Act 1965. A close look at the documents exhibited by the respondents in their affidavits showed that all matters carried out by the company were all done with approvals by the board of directors and the annual general meeting. In the circumstances it cannot be said that the first respondent company is being managed on the basis of the principles of partnership or quasi partnership.

The learned counsel for the petitioners had cited the case of *Westbourne Galleries Ltd* to support their contention that the first respondent company is a company that operates on a basis of a partnership and that the principles of partnership law should be taken into consideration in determining the state of relationship of the company's members and directors for the winding up of the company. With respect, I find that the case of *Westbourne Galleries Ltd* can be distinguished from the present case. In the case of *Westbourne Galleries Ltd* the court had identified that the said company before it became a private company was a business of partnership of two partners in E and N. N later appointed his son G as a director. The father and son of N and G did not pay dividends even though the company was making profits. Both N and G had removed E as a director. For that reason the court then exercised the principles of just and equitable to wind up the company, being a partnership company and the principles of partnership law therefore applies. However the said principles of partnership law cannot apply to the present case because in this case there is no partnership at all. Furthermore the petitioners have not shown that they had given any consideration for the shares that have been given to them. In fact the petitioners can be said to be only 'trustees' to the third respondent who at the incorporation of the company had given them the shares for love and affection as a father to all of them.

I am of the view that it would be impossible and wholly undesirable to spell out the conditions or test or to define the circumstances under which the court is to consider before it could make a finding that it would be 'just and equitable' to wind up a company. In fact, the House of Lords in the case *Westbourne Ltd* on this point at p 379 had this to say:

> Certainly the fact that a company is small one, or a private company, is not enough. There are very many of these where the association is purely a commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The super imposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of personal relationship involving mutual confidence-this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping members') of the share- holders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company — so that if confidence is lost, or one member is removed from the management, he cannot take out his stake and go elsewhere.

It is my finding that none of the above mentioned elements as spelt out in the case of *Westbourne Galleries Ltd* is present in the present case.

The petitioners have also cited the case of *Re Wondoflex Textiles Pty Ltd*'s case to support their contention that the first respondent company is being managed on a basis of a partnership. It is my view that the facts of the case in *Re Wondoflex Textiles Pty Ltd*'s case are not the same is in the present case before this court and therefore distinguishable. In the present case there is no proof shown that there exists a lack of probity or loss of confidence in the management of the first respondent company other than the unsubstantiated allegations made by the petitioners. The allegations made by the petitioners as a matter of fact were brought into existence only after this court had dismissed the application of the petitioners for the rectification of the shares register under s 162 of the Companies Act 1965 filed under the said case of Originating Summons No 24–51–1998 (T). In the case of *Re Wondoflex Textiles Pty Ltd* it is clear that the petitioner in that case had bought the shares of the company paid with consideration but in the present case the petitioners had not paid any consideration for their shares and can be said to be holding the shares as trustees for the third respondent. In the case of *Re Wondoflex Textiles Pty Ltd* the facts also showed that the respondent had tried to buy the shares at a lower value and when that failed the respondent terminated the service of the petitioner as a director. However in the present case the facts showed that the petitioners have a preplanned agenda to cease work and used it as a ground for the petition.

It is my view that even if the petitioners were right in their contention that the first respondent company when it was first incorporated was in substance a partnership, I would still nevertheless find that the company after its incorporation had remetamorphosed into a company that is being managed under the Companies Act and under its articles and memorandum of association. From the documentary exhibits in the form of minutes of the meetings of the board of director and the EGM of the company submitted on behalf of the respondents it clearly shows that the first respondent company has been managed strictly in accordance with its article and memorandum of association. On this point I would like to refer to the case of *Re Lo Siong Fong* [1994] 2 MLJ 72 wherein his Lordship

VC George J (as he then was), inter alia, held that the courts recognized situations where the relationship between the parties results in what it is really a partnership taking the form of an incorporated company. However in that case his lordship found that such a relationship among the members had been altered beyond recognition and that the quasi partnership had remetamorphosed to being an incorporated company not only in form but in fact as well. The court then concluded that the petition was brought for a collateral purpose and the appointment of a provisional liquidator was set aside and the petitioner was ordered to pay the cost of the application.

It is also my finding that the petitioners had a mala fide intention to wind-up the first respondent company and making it the means of bringing about a collateral purpose. This is so because the first petitioner at the time of the incorporation of the first respondent company he had an equal number of shares with the second respondent. However in November 1996 the second respondent was in possession of an additional 161 shares after he had purchased these shares from the shareholder Lo Yoon Khong and from then on the first petitioner was seen to be feeling envy of these additional shares obtained by the second respondent. The petitioners thereafter filed the court action under the Originating Summons No 24–51–98(T) made under s 162 of the Companies Act for the court to rectify the shares again to all the members of the company but the application was dismissed by this court with cost. Since then the petitioners began to create problems to the respondents by making the various baseless allegations and giving excuses not to turn up for work for the purpose of using them as a basis to file this petition. On this point I would like to refer to the case of *Cadiz Waterworks Co v Barnett* (Supreme Court) 1894 CA LR 182 wherein at pp 195–196 the court had this to say:

> The petition for winding up is not to be made the means of bringing about the collateral purpose, and therefore this court always acted on principle if it sees a petition to wind up presented, not for a bona fide purpose of the winding up the company, but for some collateral and sinister object, on that ground it will be dismissed with costs.

I am further of the view that since the petitioners had filed this petition with a mala fide intention and having collateral purposes then it must be treated that they had come to seek the court's assistance with 'unclean hands' and the court should dismiss such an application. On this point I would like to refer to what had been stated by the Court of Appeal in the case of *Yai Yen Hon & Ors v Lim Mong Sam @ Lim Ah Tee* [1997] 2 MLJ 190. His lordship Mokhtar Sidin JCA in delivering the judgment of the Court of Appeal and quoting the case of *Westbourne Galleries Ltd*, inter alia, stated that a petitioner who relies on the just and equitable clause must come to court with 'clean hands' and if the breakdown in confidence between him and the other parties to the dispute appears to have been due to his misconduct he cannot insist on the company being wound up if they wish it to continue.

It is also my finding that there has been an inordinate delay by the petitioners in filing this petition and added to that fact it can safely be said that the petitioners had acquiesced to all the acts and decision taken by the

Board of Directors of the first respondent company in relation to all the matters which they had now raised and alleged against the respondents. It must be borne in mind that the three petitioners between themselves are the majority shareholders in the first respondent company holding a 48.3% of the shares. The second respondent and the third respondent only hold 37.8% of the shares of the company. It is therefore evidently clear that the petitioners have every right in the company to participate actively in the running of the company. The petitioners could at any time requisition for a an EGM to ensure that anything that they wish for in the interest of the company could be carried out. The petitioners have failed to avail themselves of this avenue and hence they cannot now complain that the affairs of the first respondent company are being conducted against their interests. In the case of *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326 his Lordship Edgar Joseph Jr J (as he then was) in his judgment on this point, inter alia, states that it is settled law that delay by petitioners in initiating proceedings after they have realised that they have been victims of a scheme of oppression will induce the court to refuse relief, since this indicates that they have acquiesced in the conduct complained about and their complaints are not therefore made in good faith. Inordinate delay in the presentation of the petition in my view is sufficient to debar the petitioners from relief by way of an order for winding up. To highlight on this point further his lordship in *Re Senson Auto Supplies Sdn Bhd*'s case at pp 331-332 of the said case states as follows:

> At the very least, therefore, the plaintiffs acquiesced in these investments. They should not therefore be permitted to blow hot and cold or, to use the familiar expression in Scottish law, to approbate and reprobate.

The petitioners have also raised the issue of deadlock in the management of the affairs of the first respondent company among its directors and members to justify this court to make an order of the winding up of the company. However I find that this issue of deadlock is not pleaded at all in their petition. Nevertheless I still find that no issue of deadlock has ever been proven by the petitioners other than merely trying to assert that there is a deadlock. As such it is my finding this issue of deadlock has no basis at all. I further find that the cases cited for the petitioners to support their contention that there is deadlock has no application to the present case whereby the facts of these cases are totally dissimilar to the present case. In the case of *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426 cited by the learned counsel for the petitioners I find that in that case there were two equal director shareholders with an arbitration provision in the articles, between whom a state of deadlock came into existence. Lord Cozens-Hard MR in that case in his judgment clearly spelt out the circumstances whether there is deadlock or not at p 432 as follows:

> are such that we ought to apply, if necessary, the analogy of the partnership law and to say that this company is now in a state which could not have been contemplated by the parties when the company was formed.

In the present case I have already made a finding that the first respondent company is not being managed on the basis of a partnership and therefore

no deadlock exists in the management of the company so as to make it just and equitable to wind up the company. The court will only exercise its discretion if it is satisfied that a complete deadlock exists in the management of the company. In the present case it is my finding that the petitioners have been more unreasonable than cooperative in the management of the affairs of the first respondent company which all the while have been successful and making profits in its business undertaking. If at all there is any deadlock in my view such a deadlock would have been created by the petitioners themselves and just because they were not happy with the way things were now run, it did not mean that they would have an automatic right to wind up the company.

It is also my finding that even if the petitioners claimed that they had a legitimate expectation to manage the first respondent company in the manner that it should be managed as earlier intended when it was first incorporated, they stand to lose that equity if they abandon the task entrusted to them. In such a case, they cannot subsequently complain that they had been excluded from management merely because they wanted to get back into management. On this point I would like to refer to the case of *Re Jordan and Mckenzie* (1980) 117 DLR (3d) 751 wherein in that case the court held, inter alia, that where the petitioner walked off his job without justification and removed himself from the payroll there was no proper exclusion of the petitioner from the management. In the present case I find as a fact that the petitioners have abandoned their responsibilities towards the first respondent company. The first petitioner in particular has abandoned his responsibilities towards the company since he left for Australia in 1986 and has been making baseless allegations that the respondents had been acting in their own interests and not for the interest of the company, whereas the first petitioner himself had refused to inform the respondents when he will be around in Malaysia to work at any given time. The first petitioner is found to be also working for another company in Malaysia named Tai Lee Finance. The third petitioner on the other hand declined to be reelected as a director of the first respondent company. The third petitioner also promised to work again with the first respondent company but later lodged a report with the labour department alleging that he had been constructively dismissed from the company. To my mind all the acts of the petitioners can be deemed to be acts of abandonment of management.

The learned counsel for the petitioners also submitted that the 'just and equitable' grounds has been resorted to successfully in cases where a majority has improperly denied to the minority information about the company's affairs and such denial of information applies to the present case. The case of *Loch v John Blackwood Ltd* [1924] AC 783 was cited for the petitioners as the authority for the said proposition. In *Loch v John Blackwood Ltd*'s case the company had been formed by trustees of the will of B who had founded an engineering business. The company was formed for the purpose of taking over the business. The directors were MCL, Mrs MCL and one the nominees of Mrs MCL. Mrs L and the personal representative of R petitioned for the winding up of the company because

A the statutory conditions as to general meetings had not been observed, the balance sheets, profits and loss accounts and reports had not been submitted in terms of the articles, and that audits had not been conducted in compliance with the statute and articles. The Privy Council in that case held, inter alia, that, bearing in mind that the company was practically a domestic and family concern and that the calling of a general meeting would B not provide a remedy by the election of new directors or in any other way, it was just and equitable that the company be wound up. There was a lack of probity on the part of the directors in the conduct of the company's affairs. The conclusion that the directors lacked probity rested not only on proof of the reasons stated in the petition but also a finding that MCL's C object in keeping the other petitioners in ignorance of the state of the company was to acquire their shares at an under value.

I am of the view that the facts of the case in *Loch v John Blackwood Ltd*'s case can be easily distinguished from the present case as follows:

(1) The petitioners in the present case actually are the majority D shareholders of the company of a majority of 48.3%.

(2) The petitioners have every opportunity at every material time to obtain the information sought for relating to the company and in fact from the documentary exhibits produced through their affidavits in support of the petition showed that they are able to obtain the relevant information. E

(3) The first petitioner is also a director in the board of directors of the company who seldom attends the meeting of the board of directors as most of the time he stays in Australia.

(4) The third petitioner had the opportunity to be appointed a director of the company but he refused to seek a re-election. F

I also find that in the present case the petitioners have failed to prove that there has been a lack of probity in the part of the respondents unlike in the *Loch v John Blackwood Ltd*'s case wherein in that case the court found that the object in keeping the other petitioners in ignorance of the state of the company was to acquire their shares at an under value. None of these G matters has happened in the present case.

Last but not least in coming to the conclusion that the petitioners have not made out a case for this court to justify making an order for the winding up of the first respondent company. I have to take into consideration of the fact that one of the shareholders of the company named Lo Yoon On who H owns 13.8% of the shares and who has not been cited as a party to this petition had objected to the application of the petitioners. Lo Yoon On in his affidavit filed in opposition to this petition has urged the court not to wind up the first respondent company stating the fact that it had been well managed for the benefit of all the members of the company. Lo Yoon On in his affidavit had also stated that the first petitioner had in fact persuaded I him to be with the petitioners in taking action to wind up the first respondent company immediately after this court had dismissed their application in the case under the said Originating Summons No 24–51–

98(T) for the rectification of the shares of the company but he refused to do so. In my view this is yet another instance to show the mala fide intention and the preplanned agenda of the petitioners.

For the above stated reasons I therefore dismissed this petition with costs.

Petition dismissed.

Reported by Jafisah Jaafar